No. 17-571

In the Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
PETITIONER

v.

WALL-STREET.COM, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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PARTIES TO THE PROCEEDING BELOW

Petitioner is Fourth Estate Public Benefit Corporation, the plaintiff-appellant below.

Respondents are Wall-Street.com, LLC, and Jerrold D. Burden, the defendants-appellees below.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent Wall-Street.com, LLC certifies that it has no parent company and that no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 856 F.3d 1338. The opinion of the district court (Pet. App. 11a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2017. Pet. App. 1a. Justice Thomas extended the time for filing a petition for certiorari to and including October 13, 2017. Pet. App. 36a. The petition for a writ of certiorari was filed on October 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

According to petitioner, this case presents a straightforward circuit conflict on an important question of federal law: whether, for purposes of instituting a copyright infringement action, a claimant's "registration * * * has been made" once the claimant has applied for registration (the application approach) or only once the Register of Copyrights has acted on that application (the registration approach). 17 U.S.C. 411(a).

Petitioner is correct that this question has divided the courts of appeals. The Fifth and Ninth Circuits have adopted the application approach, while the Tenth and Eleventh Circuits follow the registration approach. Review is nonetheless unwarranted for two reasons.

First, the petition vastly overstates the importance of the question presented. Professor Nimmer has aptly called the debate over this question "a tempest in a teapot." 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][3][b][v] (2017). And the petition gives this Court no reason to think otherwise. Petitioner warns of dire consequences to the registration approach: meritorious claims lost to the statute of limitations while applications languish in the Copyright Office. But the petition cites not a single case in which this has occurred.

That is because reality is quite different. A copyright owner faces risk to her claim only if she waits until deep into the limitations period to seek registration. Even then, her most likely loss would be not her entire claim, as petitioner alarmingly contends, but rather some limited measure of damages. And in the hypothetical case where processing times would substantially impair a copyright owner's remedies, a claimant may expedite registration in a matter of days and at little cost compared to the expense of litigating an infringement action. As such, this is not the sort of substantial question worthy of this Court's review.

Second, review is unwarranted because the decision below is correct. Indeed, the answer to the question presented is quite simple. Section 411(a) does not say a claimant may file an infringement action upon application for registration. It says she may do so only once registration "has been made" or "refused." 17 U.S.C. 411(a).

Petitioner's reading of Section 411(a) is both unfaithful to the statutory text and would render important portions of the Copyright Act superfluous. A copyright simply cannot be registered or refused without action by the Register of Copyrights. That is clear from the plain language of Section 411(a) and from a multitude of surrounding provisions that speak to the Register's central role in making registration. Those provisions would lack meaning under the application approach.

The entire four-decade history of the Copyright Act overwhelmingly supports this conclusion. From enactment through several attempts at amendment, the legislative debate has rested on the premise that registration means certification by the Register. That debate has always been over whether to eliminate this requirement (in light of the very policy reasons petitioner advances here), not over what the requirement means. Congress has carefully and exhaustively engaged in the debate for forty years—and as the text and structure of the Copyright Act reflect, it has settled on a clear answer. Registration, not simply application, is necessary. Petitioner asks for an end-run around that legislative judgment, an invitation the Eleventh Circuit correctly declined.

The petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner Fourth Estate is an independent news organization that licenses its journalism to other outlets. Pet. App. 15a-16a. Petitioner alleges that Wall-Street.com

obtained a license to distribute petitioner's work, but then continued distributing that work after the license expired. *Id.* at 16a. Petitioner sued Wall-Street.com for copyright infringement "immediately" after filing an application for copyright registration with the Copyright Office. *Id.* at 18a. Because the Register had not yet acted on petitioner's application, the district court dismissed the suit under Section 411(a). *Id.* at 13a.

2. A unanimous Eleventh Circuit panel affirmed, joining the Tenth Circuit in requiring the Register to act on a copyright holder's application before suit may be filed. See *La Resolana Architects, PA* v. *Clay Realtors Angel Fire*, 416 F.3d 1195, 1197 (10th Cir. 2005), abrogated in part on other grounds by *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010); but see *Cosmetic Ideas, Inc.* v. *IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010) (adopting the application approach); *Positive Black Talk Inc.* v. *Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004) (same), abrogated in part on other grounds by *Reed Elsevier*, 559 U.S. 154.

The court of appeals recognized that this question "has split the circuits." Pet. App. 4a. But as Judge Tymkovich noted in *La Resolana*, 416 F.3d at 1202, the circuits that have adopted the registration approach are in good company. Judge Learned Hand concluded an earlier version of the Copyright Act made both "an application" for registration and "acceptance by the Register" prerequisites to suit. *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F.2d 637, 640-641 (2d Cir. 1958). More recently, the United States Solicitor General and the Copyright Office have each separately endorsed the registration approach. U.S. Amicus Br. at 24 n.14, *Reed Elsevier*, 559 U.S. 154 (No. 08-103) ("Although some courts have held that Section 411(a)'s precondition to suit is satisfied by simply filing an application for registration,

* * * those decisions are contrary to Section 411(a)'s plain text, and therefore incorrect."); U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 625.5 (3d ed. 2017) ("The mere submission of an application to the U.S. Copyright Office does not amount to a registration. This is corroborated by the statute and the legislative history.").

In line with these authorities, Judge Pryor's opinion below concluded that "the text of the Copyright Act makes clear that the registration approach * * * is correct." Pet. App. 6a. The court reasoned that the "Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office." *Ibid.* The application approach, in contrast, renders meaningless numerous provisions detailing the Register's role in this process. Because the court found the Act's plain language unambiguous, it declined to consider petitioner's policy and legislative history arguments.

ARGUMENT

Petitioner is correct that the question presented has divided the courts of appeals. The petition should, nonetheless, be denied for two reasons. First (pp. 5-8, *infra*), the question presented lacks sufficient general importance to merit review by this Court. It will rarely have any practical effect on a copyright owner's rights or remedies, and when it does, that effect is far more limited than petitioner contends. Second (pp. 8-20, *infra*), the decision below correctly concluded that Section 411(a) of the Copyright Act permits suit only after the Register has acted on an application. The Act's plain language compels that result, and every other indication of Congress's intent confirms it.

A. The Question Presented Lacks Sufficient Importance To Merit Review By This Court

This Court reserves its limited resources for questions of significant importance. Although petitioner contends the question presented fits that bill, the reality is far different. In the vast majority of cases, the stakes are low—no claims or even significant damages will be lost by requiring claimants to register before filing suit. That is precisely why Professor Nimmer has labeled this debate "a tempest in a teapot." 2 *Nimmer on Copyright* § 7.16[B][3][b][v].

Petitioner's most dire warning is that "a copyright owner may lose a remedy altogether" if the statute of limitations expires while her application remains pending. Pet. 16. That concern, however, is unfounded. The best evidence is petitioner's failure to cite any case where such forfeiture has occurred.

In reality, a claimant faces risk to her claim only if she waits to seek registration until long after infringement has begun. Given normal six- to eight-month application processing times, a plaintiff would have to delay seeking registration more than two years for the statute of limitations to become relevant. And in most courts the clock begins to run only based upon discovery of infringement.[1]

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[1] See 6 William F. Patry, *Patry on Copyright* § 20:19 (2017) ("The overwhelming majority of courts use discovery accrual in copyright cases."); *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 n.4 (2014) ("Although [this Court] has not passed on the question, nine Courts of Appeals have adopted * * * [this] 'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" (quoting *William A. Graham Co.* v. *Haughey*, 568 F.3d 425, 433 (3d Cir. 2009))); see also Pet. 5 n.5 (noting that "[t]he courts of appeals have uniformly" adopted the discovery rule).

Even if a claimant delays seeking registration beyond that point, she typically stands to lose not her entire remedy, but rather some measure of damages. That is because "the separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).

Nor will a plaintiff lose her claim in a case involving ongoing (rather than separate) violations that began more than three years previously. "Where a plaintiff challenges an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within the limitations period, measured from the last asserted occurrence of that practice." *Petrella*, 134 S. Ct. at 1969 n.6 (quoting *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-381 (1982) (brackets and ellipses omitted)). Thus, a plaintiff's damages window may shift to a less-lucrative time frame pending registration of her copyright. But it is unlikely to be eliminated. And while lost damages are undoubtedly a legitimate concern, that scenario is a far cry from the dire picture painted by petitioner.

It is theoretically possible that petitioner's worst-case scenario will arise. But even then, a claimant seeing that result on the horizon may seek "special handling" of her application and have her registration in hand within a matter of days (typically five). See U.S. Copyright Office, *Special Handling* (*Circular 10*), at 2 (2017), https://www.copyright.gov/circs/circ10.pdf. Petitioner acknowledges the availability of special handling, but contends it is no solution because the cost of expediting may be prohibitive to litigants. Pet. 16. The $800 special handling fee, however, is a pittance compared to the cost of litigating a copyright action in federal court. The case initiation fee *alone* is $400. See 28 U.S.C. 1914(a) ("instituting any civil

action" requires "a filing fee of $350"); U.S. Judicial Conference, *District Court Miscellaneous Fee Schedule* (2016) (additional $50 "[a]dministrative fee for filing a civil action"), https://goo.gl/mNWFhX. Thus, in the hypothetical case where waiting out the normal process would substantially jeopardize a claim, the special handling fee is at worst a marginal additional burden on the copyright holder.[2]

Finally, Congress has accounted for the circumstances where a delay in filing suit would be most likely to cause irreparable harm. Section 411(c), for example, permits claimants to seek an injunction against a potential infringer in advance of a live broadcast (such as the Super Bowl). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 157 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 140 (1975).[3] Similarly, Section 408(f) allows claimants to "preregister" a copyright, even before first publication, in certain circumstances where the delay in obtaining registration could cause irreparable harm (for example, to prevent piracy of highly anticipated movies or musical albums).

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[2] Petitioner argues the expense of expediting is particularly problematic in cases involving multiple works. Pet. 16. But here again petitioner dramatically overstates the scale of the issue. In many cases, a group of works (like a musical album, an anthology of poems, or a collection of articles in a periodical) can be expedited together, with the payment of a single fee. See U.S. Copyright Office, *Multiple Works (Circular 34)*, at 2-4 (2017), https://www.copyright.gov/circs/circ34.pdf. Petitioner's example of multiple recordings by various artists on an independent record label (Pet. 16) may be incapable of group registration, but its suggestion that this problem will exist in the mine-run case is simply false.

[3] In most Section 411(c) cases, no remedy beyond the time-of-broadcast injunction is pursued, and claimants therefore never seek registration. See 46 Fed. Reg. 28,846 (May 29, 1981).

17 U.S.C. 408(f). These provisions entirely defuse petitioner's concerns in the contexts where they might otherwise be most valid.

B. The Decision Below Is Correct

This Court should also deny review because the Eleventh Circuit correctly concluded that Section 411(a) permits suit only after the Register of Copyrights has acted on an application for registration.

1. The plain language of Section 411(a) and its relationship to the surrounding provisions permit only one reading: the Register must act on an application before suit may be filed. The clearest evidence of this is the text of Section 411(a) itself, which says:

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. 411(a).

By far the most natural reading of this language is that no suit may be instituted until "registration * * * has been made" or "refused." Plainly, this requires action by the Register of Copyrights before suit may be filed. The answer is that simple.

Nonetheless, the very next provision confirms the Register's central role in making registration. Section 411(b) says "[a] certificate of registration satisfies the requirements of this section." 17 U.S.C. 411(b). Only

the Register of Copyrights issues certificates of registration, and it does so only "after examination." 17 U.S.C. 410(a). If an application for registration were sufficient on its own to satisfy Section 411(a), there would be no reason for Section 411(b)'s existence. Anytime the Register issued a certificate of registration, the application would have already satisfied Section 411(a). Constructions that create this type of surplusage should be avoided. See, *e.g.*, *La Resolana*, 416 F.3d at 1203 (reasoning that the application approach would make the examination requirement meaningless).

Petitioner's reading would also render unnecessary other important parts of the statute. For example, Section 410(d) says "[t]he effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights * * * to be acceptable for registration, have all been received in the Copyright Office." 17 U.S.C. 410(d). If registration were complete upon application, there would be no need for Section 410(d) to relate the effective date back to the application's filing. Section 410(d) would be entirely unnecessary.

Perhaps even more problematic, petitioner's approach would render part of Section 411(a) *itself* unnecessary. After setting out the registration requirement, Section 411(a) goes on to say: "In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights." 17 U.S.C. 411(a).

In plain English: Section 411(a) permits suit to be filed even if the Register refuses registration, as long as notice is given. But if an application alone were sufficient to

make registration, Congress would not need to give applicants permission to sue upon refusal. Registration would always already "ha[ve] been made" under the provision's first sentence. Fully half of Section 411(a) would become surplusage.

Petitioner attempts to escape this problem by arguing that the second half of Section 411(a) actually imposes an additional *procedural* requirement, not a prerequisite to suit. That is incorrect.

As an initial matter, petitioner's reading would require the Court to give "registration" different meanings in consecutive sentences. Section 411(a)'s first sentence would require action only by the claimant, whereas its second sentence would involve action by the Register as well (refusal to make registration). This runs afoul of basic canons of statutory interpretation.

But even were it plausible to read "registration" differently in consecutive sentences, petitioner's interpretation would not be colorable. Petitioner's proposed scheme would permit suit to be filed upon application, and then require notice if the Register *later* refuses registration. But the text of the statute contemplates that refusal will come *before* the suit commences. It says that "where * * * registration *has been refused*, the applicant is entitled to *institute* a civil action for infringement." 17 U.S.C. 411(a) (emphasis added); see 5 William F. Patry, *Patry on Copyright* § 17:78 (2017) (The Copyright Act of 1976 "changed [the operative verb from] 'maintained' to 'instituted' in order to make as clear as possible" that the Register's action must come before suit is filed.). Petitioner's approach thus does not stand up to the text Congress actually enacted.

2. Each of these flaws in petitioner's reasoning arises from the same fundamental problem: petitioner's interpretation rests on the premise that "making registration"

requires action *only* by the copyright holder. But that premise is unsound. To be sure: registration cannot happen without action by the copyright holder. As discussed above, however, registration *also* requires action by the Register of Copyrights.

Indeed, petitioner has no choice but to acknowledge that the Register registers copyrights. Pet. 20, 21. Its approach would otherwise read the Register out of the Act. To avoid that result but still reach its desired construction, the petition engages in serious interpretive gymnastics, and it ultimately lands at an equally untenable solution: whenever Congress said "make" registration, it really meant "apply for" registration. See *id.* at 20 ("while the Copyright Office 'registers a claim,' the copyright owner 'makes registration'" (citations and brackets omitted)). This construction violates basic tenets of statutory interpretation. The Eleventh Circuit properly rejected it.

a. Petitioner contends that Section 411(c) "confirms" its dual-meaning interpretation of the word "registration." Pet. 19. Not so. Section 411(c) provides:

> In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement * * * fully subject to the remedies provided by [the Act], if * * * the copyright owner—
>
> (1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
>
> (2) makes registration for the work, if required by [Section 411(a)], within three months after its first transmission.

17 U.S.C. 411(c).[4]

Because a person who seeks remedies under Section 411(c) must, in certain circumstances, "make[] registration for the work * * * within three months after its first transmission," petitioner argues an application alone must be all that is necessary. Given normal six- to eight-month application processing times, petitioner suggests, it would be odd for Congress to require the Register to have acted within only three.

But that is precisely what Congress did. Section 411(c) does not purport to change the meaning of Section 411(a)'s registration requirement. It instead creates a narrow but powerful *exception* to that requirement—permitting a claimant to seek injunctive relief under the Act *without* first obtaining registration. As Congress itself explained, Section 411(c) was intended

> to deal with the special situation presented by works that are being transmitted 'live' at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the material included in the transmission.

H.R. Rep. No. 1476, *supra*, at 157; S. Rep. No. 473, *supra*, at 140.

The Copyright Office and all relevant stakeholders understood that the purpose of Section 411(c) was to enjoin infringement of live broadcasts (for example, the Super Bowl). See 46 Fed. Reg. 28,846 (May 29, 1981). And in

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[4] Prior to the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4257, this provision was labeled Section 411(b).

most cases, an injunction *at the time of broadcast* is adequate to protect the copyright holder's interests—no ongoing infringement suit is necessary. Thus, in the mine-run case, the copyright holder need not seek registration at all. *Ibid.*[5]

In the rare case where an injunction at the time of broadcast does not satisfy the copyright holder, it makes perfect sense that Congress imposed an exacting burden to maintaining suit. Section 411(c) is a strong remedy and a major exception to Section 411(a)'s general rule. That a copyright owner might have to seek special handling to take advantage of it is hardly surprising. And to prevent powerful stakeholders (like professional sports interests) from abusing Section 411(c), it is entirely logical that Congress desired the Register's input in such cases on an expedited time frame.[6]

Given the reality of Section 411(c)'s purpose and function, petitioner's reasoning is simply a red herring. Properly understood, this provision offers no reason to

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[5] That is what stakeholders themselves told the Copyright Office. For example, in response to the Register's 1981 Notice of Rulemaking regarding Section 411(c),

> [c]omments submitted on behalf of the professional sports interests * * * argued that the registration requirement is triggered only if the author or copyright owner proceeds to file an action for infringement. They indicated that they do not intend to register every work that is mentioned in [a pre-broadcast injunction], but will of course register the works if an infringement action is brought.

46 Fed. Reg. at 28,847. The Register accepted this view and thus declined to require registration anytime a copyright holder obtained a time-of-broadcast injunction. *Ibid.*

[6] Thus, to be clear, a court would be wrong to permit a Section 411(c) suit to continue beyond three months based only on an application for registration. Respondents are unaware of any case where that has occurred. And, notably, petitioner does not cite any.

believe Congress intended registration "has been made" to mean registration "has been applied for."

b. That Congress distinguished between "having made" and "having applied for" registration is emphatically underscored by the preregistration provisions of Section 408(f). Congress amended the Copyright Act in 2005 to permit "preregistration for [certain] * * * works that the Register determines ha[ve] had a history of infringement prior to authorized commercial distribution." Pub. L. No. 109-9, 119 Stat. 221 (amending 17 U.S.C. 408 to add Subsection (f)). This provision was designed to combat problems like piracy of highly anticipated movies or musical albums before they are released. See *La Resolana*, 416 F.3d at 1207.

Unlike Section 411(c), Section 408(f) does not require a claimant to "have made" registration within three months. Instead, a person who files an infringement action under Section 408(f) must "*appl[y]* for registration of the work" within "3 months after first publication." 17 U.S.C. 408(f)(3) (emphasis added).[7] Section 408(f) unequivocally shows that Congress specified "applying for" registration when that is what it meant. It entirely undermines petitioner's already suspect contention that Congress did so with the "make registration" construction. When Congress wished to make "an application for registration" the only requirement for maintaining suit, it did so expressly.

That is the bottom line: Congress meant what it said. Section 411(a) requires registration or refusal, not simply application, before suit may be filed.

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[7] Failure to do so may result in dismissal. 17 U.S.C. 408(f)(4) (requiring dismissal if the infringement commenced within two months of first publication and the application is not submitted "within the earlier of—(A) 3 months after first publication of the work; or (B) 1 month after the copyright owner has learned of the infringement").

3. Petitioner's resort to the policy underlying the Act fares no better than its textual argument. As the United States explained in *Reed Elsevier*, the registration approach entirely vindicates Congress's intent to induce registration by making it a prerequisite to suit. See U.S. Amicus Br. at 20, *Reed Elsevier*, *supra* (No. 08-103). Indeed, this requirement "serves broad[] systemic interests." *Ibid.* For example, "[b]y making the right to sue for copyright infringement contingent on registration, Congress sought to expand the Library of Congress's collection of copyrighted works, provide a public record of copyright ownership, and afford courts the benefit of the Copyright Office's expertise." *Ibid.* And as explained above (pp. 6-8, 14-15, *supra*), the registration requirement achieves these goals while imposing only a limited burden on copyright holders' ability to vindicate their rights. The registration approach thus reflects a careful balance of "incentives and sanctions" designed "to bring about the desired registration." Benjamin Kaplan, *Study No. 17: The Registration of Copyright, Copyright Law Revision Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary*, 86th Cong., 2d Sess. 65 (Comm. Print 1960).

Petitioner's arguments to the contrary do not show how its interpretation fulfills these policy goals; they explain, rather, why petitioner believes Congress should have chosen different goals in the first place. For example, petitioner argues that courts should adopt the application approach because "a copyright owner's rights do not depend on any affirmative government grant." Pet. 22. But that argument either (1) entirely ignores Congress's goal of inducing registration by making it a prerequisite to suit, or (2) expresses a preference for a different balance of incentives than the one Congress se-

lected. Either way, it is no reason to conclude an application alone satisfies Section 411(a). See *La Resolana*, 416 F.3d at 1204 (explaining that a similar argument "begs the question" because "Congress created significant incentives for registration" by "condition[ing] the remedies of the Act" on registration).[8]

Similarly, petitioner argues that its approach would not deprive courts of the Register's view on registrability, because the Register could intervene in an ongoing action if it ultimately refused the plaintiff's application. Pet. 24. Again, this may well be a sensible policy. But it hardly explains how the application approach vindicates Congress's evident desire to have the Register's input *before* suit is filed—both to weed out frivolous claims and to shape the issues that must be litigated in any given case. See, *e.g.*, H.R. Rep. No. 609, 100th Cong., 2d Sess. 41-42 (1988) ("If the requirement of registration as a prerequisite to suit were eliminated, there would likely be increased difficulty in trying copyright cases."); *id.* at 41 (the registration requirement "promotes efficient litigation practices, to the benefit of the courts and the public as well as to the parties in the lawsuit"); *id.* at 42 (discussing with approval that "suits have been kept out of court by the necessity of * * * registration and by the unwillingness of potential plaintiffs * * * following the [Register's] refusal to register because of the unfavorable light in which a judge might view the refusal to register and the undesirability of having the Copyright Office intervene in opposition"); *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 75

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[8] Another example: promptly seeking registration is a prerequisite to seeking statutory damages and attorney's fees. See 17 U.S.C. 412 (precluding certain awards based on the "effective date" of registration, which relates back to the date the application was filed).

(Comm. Print 1961) ("Since the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law, we believe the requirement of registration before suit should be maintained.").

If anything, petitioner's policy arguments underscore how the application approach *diverges* from current law, and would serve policy goals different from the ones embodied in the Copyright Act.[9]

4. Even if the application approach were the better policy, the Copyright Act's history confirms what is al-

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[9] Petitioner's policy argument also relies heavily on Professor Nimmer's criticism of the registration approach. Pet. 22, 25. Notably, though, Nimmer frames his discussion as a "critique of the current regime." 2 *Nimmer on Copyright* § 7.16[B]. And the approach he ultimately recommends is emphatically *not* the application approach. Nimmer instead proposes that courts apply a "harmonized solution" that draws elements from *both* approaches. *Id.* § 7.16[B][3][b][vi].

To be sure, in laying the groundwork for this solution, Nimmer says the application approach "better comports with the statutory structure" than the registration approach. 2 *Nimmer on Copyright* § [B][3][b][ii]. But this preference in fact sounds in policy, not text.

Nimmer reasons that because "the claimant * * * has done all that she can do, and will ultimately be allowed to proceed regardless of how the Copyright Office treats her application, it makes little sense to create a period of 'legal limbo' in which suit is barred." 2 *Nimmer on Copyright* § [B][3][b][ii]. Thus, "the application approach best effectuates the interests of justice and promotes judicial economy," particularly because "the Copyright Office typically registers about 99 percent of the claims submitted to it." *Ibid.* (internal quotation marks and brackets omitted).

Certainly, these are thoughtful reasons one might disfavor the registration approach as a *policy* matter, but they say little indeed about the meaning of Section 411(a)'s *text*. And in any event, this passage is but a stop along the way to Nimmer's preferred policy—the "harmonized solution." Nimmer's view, therefore, is of limited relevance, if any, in resolving the question presented.

ready plain from the Act's text: it is not the approach Congress enacted. Indeed, the legislative history *overwhelmingly* supports the Eleventh Circuit's conclusion that the Act requires registration, not just application. It does so not because it reveals some intent not otherwise embodied in the text, but because it unequivocally shows that for forty years, the entire legislative debate has rested on the premise that registration requires action by the Register.

In passing the Copyright Act of 1976, Congress debated whether to make registration a prerequisite to suit, but it never questioned what that requirement entails. The legislative history shows, for example, that Judge Hand's decision in *Vacheron*, 260 F.2d at 640-641 (holding that "acceptance by the Register" was a prerequisite to suit), informed Congress's understanding of the background law against which it was legislating. Although Congress partially abrogated *Vacheron* by permitting suit even where the Register refuses registration, it explained that "[u]nder the bill, *as under the law now in effect*, a copyright owner who has not registered his claim * * * cannot enforce his rights in the courts." H.R. Rep. No. 1476, *supra*, at 157 (emphasis added); S. Rep. No. 473, *supra*, at 139; see *ibid.* ("The second and third sentences of [S]ection 411(a) would alter the present law as interpreted in *Vacheron*" by permitting infringement actions where the Register refuses registration, rather than "requir[ing] an applicant * * * to bring an action against the Register."); *Report of the Register* 75 (same).

Congress did not make this decision lightly. It exhaustively considered options for eliminating the registration requirement altogether or replacing it with a less stringent alternative. See, *e.g.*, Kaplan 1-65, 85-98 (detailing alternative approaches). Among the "major issues" in that debate was whether "registration, *or application*

therefor, [should be] a prerequisite to an action for infringement." *Id.* at 98 (emphasis added).

The terms of the debate could not have been clearer. Both the registration approach and the application approach were on the table, and the text of Section 411(a) shows Congress made a clear choice between them.

In the intervening years, Congress has twice more considered eliminating the registration requirement. Legislators have repeatedly raised policy considerations similar to the ones petitioner relies on here—that the registration requirement is a wasteful formality that does not effectively accomplish its stated goal of inducing registration. *E.g.*, H.R. Rep. No. 388, 103d Cong., 1st Sess. 9-11 (1993) (arguing in favor of "eliminat[ing] the last significant vestiges of the formality-based approach to United States copyright law" for these reasons); compare *id.* at 10-11 (suggesting the Copyright Office's "role of gatekeeper to the courts" was inappropriate), with Pet. 22 ("Making the Copyright Office the gatekeeper to enforcement of copyrights is inconsistent with the rest of the Copyright Act."). But throughout this debate, no legislator has ever suggested that registration does not actually require the Register to act on the application. Both sides of the debate have always operated on the premise that registration means registration.

The importance of this history is hard to overstate. It is not just that Congress has three times rejected petitioner's position. Far more important to the *textual* analysis is that all stakeholders on both sides of the policy question have agreed on the debate's terms.

Petitioner now attempts to rewrite those terms not through advocacy to Congress, but through judicial revision. The Eleventh Circuit properly rejected this effort to subvert Congress's judgment, and it correctly concluded

that Section 411(a) permits suit only once the Register has acted on a copyright owner's application for registration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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